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No. 87-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SOUTHWESTERN BELL TELEPHONE COMPANY,
Petitioner,

v.

ARKANSAS PUBLIC SERVICE COMMISSION, and
COMMUNICATIONS WORKERS OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT COMMUNICATIONS WORKERS OF AMERICA IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

JAMES B. COPPESS
1925 K Street, N.W.
Washington, D.C. 20006

WILLIAM FRANZ
2334 Olive Street
St. Louis, MO 63103

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

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TABLE OF CONTENTS

	Page
ARGUMENT	2
CONCLUSION	9

TABLE OF AUTHORITIES

CASES:

Golden State Transit Corp. v. Los Angeles, —— U.S. ——, 106 S.Ct. 1395 (1986)	2, 6, 7
H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970)	3
Machinists v. Wisconsin Empl. Rel. Comm., 427 U.S. 132 (1976)	3
Massachusetts Nursing Ass'n v. Dukakis, 726 F.2d 41 (1st Cir. 1984)	4
Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724 (1985)	3, 6, 8
Wisconsin Department of Industrial Relations v. Gould, —— U.S. ——, 106 S.Ct. 1059 (1986)	2, 5

STATUTE:

National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*	*passim*

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The Communications Workers of America (CWA), a party in this proceeding in the courts below, files this brief in support of the petition for a writ of *certiorari* as provided for in Rule 19.6 of the Rules of this Court. The *certiorari* petition (at pp. 2-7) fairly and completely sets out the opinions below, the basis of this Court's jurisdiciton, the statutory provisions involved and a statement of the case; we, therefore, do not repeat those materials here.

ARGUMENT

This case raises a complex labor relations preemption question of great practical importance analogous to—but at a remove from—those recently decided by this Court in *Wisconsin Department of Industrial Relations v. Gould*, —— U.S. ——, 106 S.Ct. 1059 (1986), and *Golden State Transit Corp. v. Los Angeles*, —— U.S. ——, 106 S.Ct. 1395 (1986). The court of appeals' decision, as the *certiorari* petition shows, and as we elaborate below, cannot be squared with the principles stated by this Court in *Gould* and *Golden State*. For these reasons, CWA joins with Southwestern Bell in urging plenary review of the decision below.

1. The question in this case is whether a state may, as part of its procedure for making rates to be charged by a company in a regulated industry, judge the propriety of the terms of a multistate collective bargaining agreement and—based upon its disapproval of some of those terms as unreasonable—set the rate at a level that does not permit the company to recover a portion of those labor costs. The employer, and the union, contended below that to permit the state to do so is fundamentally inconsistent with the basic commitment of the National Labor Relations Act, as amended, 29 U.S.C. § 141 *et seq.*, to the establishment of labor conditions through free collective bargaining rather than through governmental fiat.

The court of appeals' answer to this contention was that the states are free to determine that an employer's collectively bargained terms of employment are unreasonably generous to his employees based upon a comparison with the terms established by other employers—including terms established unilaterally by employers who do not engage in collective bargaining—and may on that basis take regulatory action harmful to the employer. The only limitation upon state action of this kind, according to the court of appeals, is that such regulation must stop

short of actually forbidding the employer from abiding by the collectively bargained terms:

> Nothing in the Commission's order encroaches upon either party's ability to use economic pressure in future negotiations to gain concessions from the other. . . . Furthermore, the Commission has not vetoed the wage agreement. * * *
>
> We conclude that the Commission's action disallowing recovery of certain non-management wage and benefit expenses does not rise to the level of an impermissible intrusion into or control over the relationship between the Company and CWA. . . . Any indirect effect of the ratesetting action taken in this case . . . falls short of the kind of state interference with the labor-management relationship that Congress intended to proscribe. [Pet. App. B, at 8, 11.]

2. There is no doubt that, had the commission *ordered* the employer to pay less than the wages established in the collective bargaining agreement with the union, or not to bargain for more than a specified wage for particular jobs in the next agreement, the order would be inconsistent with Congress' intent in enacting the NLRA, and therefore invalid. *See, H.K. Porter Co. v. NLRB*, 397 U.S. 99, 103 (1970) ("The object of th[e] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions."); *Machinists v. Wisconsin Emp. Rel. Comm'n*, 427 U.S. 132, 154 (1976). ("[S]tate attempts to influence the substantive terms of collective bargaining agreements are as inconsistent with the federal regulatory scheme as are such attempts by the NLRB. . . ."). *Compare, Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 753-758 (1985) (state laws setting minimum labor standards are not preempted). Indeed, the court of appeals' opinion appears to assume that point. But the court below thought that because the commission's disapproval of

the collectively bargained wages as "unreasonable" resulted only in an order economically detrimental to the company's shareholders,[1] and not in a directive to pay only the "reasonable" wage, there is no federal labor law preemption.

The court of appeals appears to have been moved by two predominant considerations. First, "nothing in the NLRA guarantees that wages agreed upon in collective bargaining will be recovered from consumers, whether the business is regulated or not." Pet. App. B, at 8. And, second, because "in any regulated industry, myriad governmental decisions, from rate setting to the imposition of safety standards, undoubtedly will affect labor relations," Pet. App. B, at 11, the NLRA may not preempt otherwise legitimate regulatory activity that simply affects the economic climate for bargaining.[2] Contrary to the court below's supposition, neither of these points serves to distinguish *this* case from others in which this Court has found that state action *is* preempted by the NLRA.

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[1] If ratemaking is functioning properly, a utility's revenue will be composed only of operating expenses and a return on the company's rate base. If the company incurs actual operating expenses in excess of those allowed as part of the officially determined allowable costs, management must pay the extra expenses out of the amounts designated for return on the company's rate base. Since one component of those amounts, the cost of debt, is set by the contractual terms of the debt issue, any disallowed costs must come out of the return on equity. And since this return is set in the first place by the commission, which permits only that return on equity that is "just and reasonable", it is necessarily the case that any disallowance of actually-incurred costs in the rate calculation will bring the return on equity to shareholders below a "just and reasonable" amount. *See* Pet. App. D, at 4-6.

[2] *See also* Pet. App. B at 10, *quoting Massachusetts Nursing Ass'n v. Dukakis*, 726 F.2d 41 (1st Cir. 1984) ("[a]ny state or municipal program that substantially increased the costs of operation of a business in a competitive market would be similarly vulnerable to [the present] preemption argument").

(a) The court of appeals' analysis disregards the central circumstance that while ratemaking procedures for regulated industries are, in economic terms, substitutes for free market competition, the regulatory process through which that economic purpose is accomplished is a *governmental* process, as to which analogies to the preogatives of private decisionmakers are not pertinent. The Court so held in *Gould*, *supra*, in rejecting the argument that a governmental procurement boycott of labor law violators is valid because private entities could engage in such a boycott:

> Nothing in the NLRA, of course, prevents private purchasers from boycotting labor law violators. But government occupies a unique position of power in our society, and its conduct, regardless of form, is rightly subject to special restraints. . . . The NLRA, moreover, has long been understood to protect a range of conduct against state, but not private interference. *See, e.g., Machinists* [*supra*]. . . . The Act treats state action differently from private action not merely because they take different forms, but also because in our system States simply are different from private parties and have a different role to play. [*Gould, supra*, 106 S. Ct. at 1063.] [3]

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[3] Whether or not the public service commission directly reviews collectively bargained wage rates, there are constraints inherent in the regulatory process that limit a utility's ability to increase costs, and these constraints work to limit wage increases.

For example, regulatory lag means that even those costs allowed may not be passed on to the consumer through rate increases until years after the costs are incurred. Further, the consumer market for the products of utilities is not entirely inelastic despite the lack of direct competition; thus, if prices rise too high, demand is likely to drop. Finally, there is a general hostility of public service commissions to large price raises whatever the components that go into calculating the rates, and there is enough discretion in those commissions in setting rates of return and calculating those costs that can be reviewed to prevent utilities from requesting rate increases for any costs that are not necessary.

(b) The court of appeals was, moreover, much too cavalier in treating the commission action at issue as indistinguishable for analytic purposes from all other forms of governmental economic regulation that could have an inhibiting influence on collective bargaining. Here, the decisionmaking process *focused directly* upon the labor relations issue; used criteria—a comparison to both union and nonunion jobs—that is in tension with the protection of collective activity in the NLRA; and built into the resulting rate what is in effect a penalty—less than a just and reasonable return on equity—if management continues to abide by its federal obligation to observe executed collective bargaining agreements and to negotiate new agreements with an open mind and in good faith.

It is certainly true that state regulation, including ratemaking, which merely affects (even severely) the economic circumstances in which bargaining takes place is not, for that reason alone, necessarily within the area that Congress "intended to be unregulated" in enacting the NLRA. 471 U.S. at 749. Rather, as the Court noted in *Metropolitan Life, supra*, the NLRA was enacted against a background of state law, and Congress' general presumption was that the states would continue to have extensive regulatory authority. 471 U.S. at 756-758. It is also true, however, that at some point short of an order *forbidding* an employer from abiding by a collective bargaining agreement or forbidding an employer to engage in collective bargaining in the future, a state regulation can so limit collective bargaining as to intrude into the area designed by Congress to be free of governmental intrusion.

This Court so held in *Golden State, supra*. In that case, as here, the government was faced with making a decision within its proper preogative: here, setting rates for a public utility, there, deciding whether to renew a license for a taxicab company. In this context as

long as a public authority makes its decision in a way that does *not* factor in labor relations considerations as determinative, the fact that that decision could have an impact, even a conclusive one, upon the outcome of a labor dispute is *not* relevant to the preemption inquiry:

> [T]he question is not whether the city's action favors one side or the other. Our holding does not require a city to renew or to refuse to renew any particular franchise. We hold only that a city cannot condition a franchise renewal in a way that intrudes into the collective bargaining process. [*Golden State*, *supra*, 106 S. Ct. at 1401.]

At the same time, the Court held in *Golden State* that denying a franchise for the particular, labor relations reason that a labor dispute was in progress "destroyed the balance of power designed by Congress and frustrated Congress' decision to leave open the use of economic weapons." 106 S. Ct. at 1401. And this was so even though the city's decision did *not* constitute an order to the company to settle its strike, but merely a withholding of a governmental privilege if the company failed to do so.

Contrary to the holding of the court of appeals, then, this case and *Golden State* are not different in kind, the difference between the two—if these is any legally relevant difference—is one of degree.

The non-preemption holding of the court below rests on nothing more than the difference between a severe economic impact—disallowance of a franchise which may be critical to continuation of the business—due to a governmental decision that in terms is based upon considerations the NLRA intended to leave to the parties to a bargaining relationship and a less severe impact—disallowance of a portion of the just and reasonable return on equity otherwise due to shareholders—as a result of a similarly labor-relations based governmental decision.

That, we submit, is too subjective and ephemeral a distinction on which to base preemption analysis.

3. As the *certiorari* petition notes, the legislative history of the NLRA shows that Congress considered the question whether terms and conditions of employment for employees of public utilities should be limited by the government, and decided *against* that course. Pet. at 9 n.5. The particular form of regulation in this case—judging wages in a unionized workplace unreasonable because they are more than 110% of the wages for supposedly comparable jobs in a sample of workplaces, including many with no collective bargaining relationship—is directly inconsistent not only with that decision but with the NLRA's expectation and hope that "the resolution of the problem of 'depress[ed] wage rates and the purchasing power of wage earners in industry,' 29 U.S.C. § 151, and the 'widening gap between wages and profits,' 79 Cong. Rec. 2371 (1935) (remarks of Sen. Wagner), thought to be the cause of economic decline and depression . . . [could be] accomplish[ed] . . . by establishing procedures for more equitable private bargaining." *Metropolitan Life Ins. Co. v. Massachusetts, supra*, 471 U.S. at 754.

CONCLUSION

For the reasons stated above and in the petition, *certiorari* should be granted.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street
San Francisco, CA 94108

JAMES B. COPPESS
1925 K Street, N.W.
Washington, D.C. 20006

WILLIAM FRANZ
2334 Olive Street
St. Louis, MO 63103

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390